In the High Court of Judicature at Madras

Dated: 09-01-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.103 OF 1997

Malarkodi ..Appellant/Plaintiff

vs

1. Chidambaram
2. Mala ..Respondents/Defendants

Second appeal filed against the judgment and decree dated 24.7.1995 made in A.S.No.52 of 1994 on the file of the Sub Court, Nagapattinam, confirming the Judgment and decree dated 20.8.1992 passed in O.S.No.166 of 1992 on the file of the District Munsif's Court, Nannilam.

For Appellant : Mr.S.Parthasarathy
For Respondents : No appearance.

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.52 of 1994 on the file of Sub Court, Nagapattinam. The plaintiff in O.S.No.166 of 1992 on the file of District Munsif's Court, Nannilam, who has lost her case before the trial Court and the first appellate Court has preferred this appeal.The suit is for permanent injunction.

2. The short facts of the plaintiff's case relevant for the purpose of deciding this appeal sans irrelevant particulars are as follows:
The plaint schedule property belongs to Sundaravalli Ammal, who died, leaving her son and three daughters. The plaintiff is the youngest daughter of Sundaravalli Ammal. Sundaravalli Ammal lived along with the plaintiff till her death. Out of her love and affection, Sundaravalli Ammal had executed a "Will" on 1.3.1985 in favour of the plaintiff bequeathing the plaint schedule property in her favour. Sundaravalli Ammal died on 15.3.1991. From that date onwards, the above said "Will" came into force. When the defendants came to attend the obsequies of Sundaravalli Ammal, the plaintiff showed the "Will" to the defendants, who have also admitted the same,have demanded some amount to which the plaintiff has not acceded. The defendants left the place by intimidating that they will by any means evict the plaintiff from the suit property. Hence the suit.

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3. The second defendant has adopted the written statement filed by the first defendant which is as follows:

The plaintiff is the sister of defendants 1 and 2. Apart from these two sisters, the plaintiff is also having another sister by name Dhanalakshmi. The suit property originally belonged to one Arumugam, the grand father of the plaintiff and the defendants, who died leaving his sons Duraisamy and Narayanasamy. In the family partition, the suit property was allotted to the share of plaintiff and the defendants' father Duraisamy, who died in the year 1979 leaving behind his wife, Sundaravalli Ammal and the plaintiff and the defendants and another daughter Dhanalakshmi, as his legal heirs. The first defendant has left the village in search of a job and he would secure a job at Mudikondan Village and he is permanently residing there. Upto 15.3.1991, Sundaravalli Ammal was residing in the plaint schedule property and enjoying the same. The first defendant was residing with his mother, helping her in arranging the marriage for her sisters. Till the death of Sundaravalli Ammal, the first defendant was residing with her. All the other averments contrary to the above said facts in the plaint are denied as false. This defendant made arrangements for conducting the marriage of the plaintiff in the year 1979. During 1985-86, this defendant along with his mother helped the plaintiff and her husband to conduct the tea stall at the village. The plaintiff and her husband were under the care and protection of Sundaravalli Ammal till her death. The first defendant also helped them in conducting the tea stall. The plaintiff and her husband ill treated Sundaravalli Ammal and in this regard, many Panchayats were held between Sundaravalli Ammal and the plaintiff. The plaintiff refused to heed to the advise of the panchayatars, Sundaravalli Ammal preferred a complaint to the police against the plaintiff on 29.6.1990 which ended in compromise. In the said Panchayat, the plaintiff and her husband agreed to vacate the suit house and also agreed to reside separately. For that 15 sq feet of plot was allotted to them for constructing a separate house near the suit property. The said settlement was reduced to writing in which both the plaintiff and Sundaravalli Ammal have signed. As per the above settlement, the plaintiff has also vacated the suit house and began to reside in a nearby hut put up by her and her husband. Sundaravalli Ammal began to reside in the house of one Kandaswamy, brother of her husband, due to the ill treatment received at the hands of the plaintiff and her husband. At that time, Sundaravalli Ammal had locked the suit house. To fulfil the last desire of Sundaravalli Ammal a hand full of sand was taken from the suit house to be handed over to her and at that time, both the plaintiff and her husband quarrelled which resulted in a complaint preferred by Sundaravalli Ammal with the police. The police warned both the plaintiff and her husband not to give any trouble to Sundaravalli Ammal and on the same day ie., on 15.3.1991 Sundaravalli Ammal expired. The first defendant met the cremation expenses of Sundaravalli Ammal and obsequies were also performed by the first defendant. The house of Sundaravalli Ammal in the suit property was kept

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under lock and key immediately before and after the death of Sundaravalli Ammal. Two days after her death, both plaintiff and her husband broke open the lock and trespassed in to the suit house. The plaintiff and her husband are in possession of the suit property only in the capacity of the trespassers. Sundaravalli Ammal had not executed any "Will" in favour of the plaintiff as alleged in the plaint. The alleged "Will" in the plaint dated 1.3.1985 is a forged document and created for the purpose of this case by the plaintiff. During the life time, she has not executed any "Will" in favour of the plaintiff or anybody else. On the basis of the "Will" the plaintiff is not entitled to claim any right in the suit property. The suit property is the ancestral property of the defendants. The first defendant is entitled to 7/10th share in the suit property. Sundaravalli Ammal is entitled to 1/10th share alone in the suit property. The plaintiff has no cause of action to file the suit. Hence the suit is liable to be dismissed with costs.

4. On the above pleadings, the trial Court had framed five issues and on the basis of the documentary and oral evidence let in by both parties, the learned trial Judge has come to a conclusion that the plaintiff is not entitled to an order of permanent injunction as prayed for in the suit against the defendants and consequently dismissed the suit without costs. Aggrieved by the findings of the learned trial Judge, the plaintiff has preferred an appeal in A.S.No.52 of 1994 before the Sub Judge, Nagapattinam. The learned Subordinate Judge, after careful consideration , has dismissed the appeal, confirming the findings of the learned trial Judge. Hence the second appeal by the plaintiff before this Court.

5. The substantial questions of law involved in this appeal are

i) Are the decree and judgment of Court below liable to be reversed for non consideration of the relevant evidence adduced by the plaintiff?

ii) Whether Ex A1 'Will' pro-founded by the appellant are properly proved as required by law?

Iii) Whether in the light of evidence of the attestors (P.W2 and P.W.3) the refusal of the Courts below to give effect to the said Will is legal and proper?

6. The Point:

The only and foremost point for determination in this second appeal is that whether Ex A1 "Will" dated 1.3.1985 has been proved by the plaintiff as required under law. EX A1"Will" is an unregistered one. So the burden of proof is heavily upon the plaintiff to prove beyond any reasonable doubt that EX A1 "Will" was executed by Sundaravalli Ammal. There are five witnesses, beside a scribe, have signed in the "Will" dated 1.3.1985 as required under Sections 68 and 69 of the Indian Succession Act, and under Section 63 of the Indian Successio Act is to be proved at least by examining two attestors to the "Will". The plaintiff has examined P.W.2 and P.W3, the attestors to the "Will" EX A1. P.W.2 is one

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T.V.Govindarajan, who has signed in Serial Number 2 to Ex A1 "Will". In his evidence in the chief examination,P.W.2 would depose that the recitals in Ex A1 was written by one Panchyat Clerk and at the time of preparing the "Will", a draft was written and read over to the witnesses and to the testator of the "Will". He would depose to the fact that at the time, when Sundaravalli Ammal affixed the left thumb impression in the "Will" he and other witnesses were present and he and other witnesses have signed in Ex A1 "Will", and Sundaravalli Ammal also saw the same. But in the cross examination, P.W.2 would depose that he does not know about the contents of the "Will". According to P.W.2 ,Ex A1 recitals were written by the scribe only after preparing a draft,but he say that the draft was destroyed. The other attestor viz., P.W.3 in his evidence, would depose that the recitals in Ex A1"Will" were written by one Panchayat clerk. According to P.W.3, only with the help of T.V.Govindarajan, the left thumb impression of Sundaravalli Ammal was obtained in the "Will",but the said T.V.Govindarajan was not examined. P.W.2-Govindarajan also in his evidence would admit that there is another T.V.Govindarajan available in the village. P.W.2 has not stated in his evidence that he helped Sundaravalli Ammal to affix her left thumb impression in the "Will". According to P.W.3 Vairakannu, the draft "Will" was prepared only by the Panchayat clerk. It is not deposed either by P.W.2 or P.W.3 that only as per the recitals of the testator Sundaravalli Ammal, the recitals in Ex A1 "Will" were written. P.W.3 would depose that the recital viz., the left thumb impression of Sundaravalli Ammal at the side of LTI may be written by one Thangaraj. If P.W.2 ,P.W.3 would have been present at the time of execution of Ex A1 then they will be in a position to say who was actually written the endorsement left thumb impression near the LTI of Sundaravalli Ammal in ExA1 "Will". From the evidence of P.W.2, it is clear that he does not know anything about Ex A1 "Will". In the cross examination, he would candidly admit that he does not know about the details of the Will. Under such circumstances, both the Courts below have correctly come to the conclusion that Ex A1"Will" is not proved by the plaintiff.

7. It is the admitted case of the plaintiff Malarkodi as P.W1 that till the death of Sundaravalli Ammal, the mother of the Plaintiff was residing only with her. So definitely, she would have knowledge about the "Will" Ex A1 but she has not deposed in her chief examination when she actually got the knowledge about the execution of "Will" Ex A1, by her mother Sundaravalli Ammal. If Ex A1 "Will" goes then the plaintiff as one of the co-sharer is not entitled to get an order of permanent injunction against the defendants who are admittedly the other co-sharer in respect of the plaint schedule property. So the Courts below have rightly come to the conclusion that the co-sharers is not entitled to get an order of permanent injunction in respect of the suit property against other co-sharers. I do not find any reason to interfere with the Judgment of the learned Subordinate Judge, Nagapattinam in A.S.No.52 of 1994 which does not suffer from any illegality or infirmity to warrant any interference from this Court. Point is answered accordingly.

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8.In the result, the appeal is dismissed confirming the Judgment and decree in A.S.No.52 of 1994 on the file of Sub Court,Nagapattinam. Considering the close relationship of the parties, there is no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Sub Judge, Nagapattinam.

2. The District Munsif, Nannilam.

3. The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To Mr.S.Parthasarathy, Advocate, SR.1835.

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